CLARK FORK
COALITION

January 9, 2018

Mr. Jason Mohr & Members of the Water Policy Interim Committee

Dear WPIC Members,

As a conservation organization dedicated to protecting and restoring the water resources of the Clark Fork watershed and holder of over 30 water rights (including senior water rights), the Clark Fork Coalition (CFC) has long been a stakeholder in Montana's developing groundwater policies. CFC's organizational focus has been on ensuring that our state's groundwater appropriation policies are based on sound science and are in line with the prior appropriation doctrine and the Montana Water Use Act. In addition, CFC has worked to establish groundwater policies that uphold our Constitution's directive that senior water users be afforded all applicable protection of their property interests and that Montana's water resources be protected from "unreasonable depletion." *Mont. Const.* Art. II, Sec. 17; Art. IX, Sec. 1. In step with this mission, the Coalition has long worked to prevent unfettered development of Montana's water groundwater resources outside of the state-wide permitting process.

On the ground, the CFC's efforts have been aimed at closing the "exempt well loophole." The exempt well loophole has already been through a decade of administrative and Court proceedings, culminating on September 13, 2016 with the Montana Supreme Court decision in *Clark Fork Coalition v. Tubbs* (2016 MT 229). In that decision, the Supreme Court affirmed that the exempt well loophole —created in 1993 by a DNRC rule defining "combined appropriation" — was invalid. DNRC's 1993 rule specified that projects with multiple wells drawing less than 35 gallons per minute (and no more than 10 acre feet a year) from the same water source only had to get a permit if those wells were physically piped together. As a result, the rule allowed large consumptive water users to evade review, notice, objection, and permitting processes, which the Court determined was in direct conflict with the purpose of the Montana Water Use Act to protect senior water rights. The Court emphasized that the primary function of this permit-based system is the protection of senior water rights from encroachment by prospective junior appropriators adversely affecting those rights.

As the record showed, the exempt well loophole had opened the door to a proliferation of subdivisions and put groundwater supplies, senior water rights and stream flows at risk. After the adoption of the 1993 rule, three of four new homes built in Montana relied on wells that were exempt from permitting. That resulted in 110,000 new exempt wells getting drilled into aquifers without a water right, without assurances that there would be no harm to other senior water users, without notice to senior water rights users, and without any process provided for senior water right users to object. During the two decades under the 1993 rule, large subdivisions on individual exempt wells proliferated in fast-growing areas located in water basins otherwise closed to new water development, such as Ravalli, Gallatin, and Madison counties. The Montana Supreme Court decision recognized that DNRC's 1993 rule was at odds with the prior appropriation doctrine and jeopardized how Montanans work together to share and care for our water resources.

As WPIC members are aware, the CFC was opposed to the most recent legislative attempt to address the exempt well issue: HB 339. During WPIC's October 2017 meeting, CFC participated in a panel and we articulated our opposition to HB 339 and our underlying reasoning. Rather than rehash this opposition, the CFC has instead drafted this letter to outline our policy position and offer options for improving the current framework. Our hope is that by sharing this letter with policymakers, water users and other stakeholders, we will forge a path toward a productive discussion on how to ensure the best possible future for our water resources and the people of Montana.

**The Coalition is Not Opposed to All Exempt Wells**

The CFC recognizes that there can, and should be, a mechanism in place that allows farmers, ranchers, and Montana families the opportunity to use small amounts of water without going through the lengthy permitting and review process. This is the reason that Montana's groundwater exemptions (limited to 35 GPM not to exceed 10 AF/year) were put in place by the legislature. However, as noted by the Montana Supreme Court in the *CFC v. Tubbs* decision, an exemption from the permitting requirements of the Montana Water Use Act only squares with the underlying intent of the Act if it allows *de minimus* quantity of water to be appropriated. *Clark Fork Coalition v. Tubbs,* 2016 MT 229 at ¶ 24. Therefore, in our mind, any discussion of current or future groundwater policy must address the cumulative, quantitative impact of exempt wells.

**There is No Evidence that the Current Framework is Impeding Development in Montana**

At the request of WPIC members, the DNRC recently compiled information on the number of exempt wells being approved or denied under the current regulatory framework. As the numbers show, despite the closing of the exempt well loophole in 2014, the number of exempt wells being drilled in Montana has stayed consistent, hitting a 7-year high in 2016. Of roughly 1,600 proposed subdivisions relying on exempt wells since 2014, 1,491 were approved and 54 were denied. Likewise the number of single family homes being built statewide has increased each year since 2014, growing 9% between 2015 and 2016 according to statistics from the Montana Building Industry Association. These figures indicate that a tremendous amount of water is still being appropriated outside of the permitting process, with no analysis of potential impacts on senior water rights or stream flows.

As a practical matter, the current framework, which limits single exempt appropriations to 10 AF/year, is more than sufficient to allow for small-scale residential developments. A WPIC study from 2012 outlined multiple development options using this quantity of water:

- Quarter-mile spacing between wells allows for 160 AF/year to be appropriated without a permit per section of land. 160 AF/year is enough to irrigate 50-80 acres, or enough water for at least 300 households;
- 20 lot subdivision in Bozeman with 3,500 $ft^2$ lawn and garden per household would consume approximately 9.2 AF/year (.3 AF/household and .16 AF/lawn and garden);
- 10 lot subdivision in Billings with a 1/4 acre lawn and garden per household would consume approximately 9 AF/year;
- Provides enough water to supply over 500 animal units for 1 year;
- Provides enough water to sprinkler irrigate roughly 7 acres.

Further, using anecdotal evidence as well as data provided by the DNRC, we can see that subdivision development continues to take place across our state using these exempt appropriations:

- For example, a recent subdivision proposed in Missoula County (B&M Zoo Subdivision) was able to secure DNRC approval to use an exempt appropriation to provide 18 residential dwellings (each with 3,267 $ft^2$ of lawn and garden) plus an additional 2.35 acres of irrigated common areas.

- The Garden Valley 2 Subdivision proposed in Lewis and Clark County proposes a 36-lot subdivision on a roughly 74-acre parcel served by 4 exempt wells, with each well serving 9 lots. According to the proposal, each well would serve 2.52 AF/year for domestic use and 7.29 AF/year of lawn and garden irrigation, for a total of 9.8 AF/year per exempt well.

The CFC suggests that these examples may actually stretch the definitions of small-scale development with *de minimus* impacts to water resources. The available data appear to indicate that if there is a problem with the existing exempt well framework, it is not that it represents an undue burden to development, but rather that in its permissiveness it may jeopardize senior water rights and streamflows and invite further legal challenge from competing water users.

**The Coalition Opposes the Use of Exempt Wells for Unfettered Development**

While CFC does not oppose the reasonable and lawful use of exempt wells for rural development, exempt wells used as a means of water supply for significant residential developments should not be allowed. We have over 113,000 exempt wells in Montana – equal to 1 million acre-feet of water per year. Of these, 72,000 of those were established after the 1993 loophole was implemented. Of the more than 28,000 residential lots created within rural subdivisions from 2004-2011, about 18,700 (nearly 70%) were served by exempt wells. These wells are unmetered, so the threshold flow rate and limited annual volume are not monitored or enforced. The aggregate impact of further unmitigated and unpermitted groundwater appropriation carries with it further potential to cause surface water depletions, lower the water table and adversely affect senior water rights. With a 5.4% growth rate from 2000-2016 (much of that within closed basins) Montana is the 16th fastest growing state in the country. We simply cannot afford to re-adopt a laissez faire approach to groundwater appropriations.

**At a Minimum, a Discussion of Future Groundwater Policy Should Include the Following Principles**

- **The policy should not allow for a significant *quantitative* impact to the water resource outside of the permitting process.** Ultimately any groundwater exemption needs to be sufficiently narrow so as not to exceed the *de minimus* threshold that justifies an exception to Montana's water laws. Ideally, this policy would require some sort of metering associated with exempt wells going forward.

- **The policy should give notice of exempt appropriations/developments to existing water users.** Without notice, existing water users are in the dark about the drilling of exempt wells on nearby properties and possible threats to their own water source.

  **The policy should give senior water users some type of mechanism to object to exempt appropriations or developments that may impact their senior rights.** The Montana Supreme Court has repeatedly held that the Montana Water Use Act is designed to strictly adhere to the prior appropriation doctrine and provide for the administration, control and regulation of water rights to protect existing uses. How do we protect existing uses? By requiring proposed appropriations to prove they will not

adversely affect existing rights. If we are going to allow appropriations outside of the permitting system, we at least need to afford other water users due process of law to defend their property interests.

- **The policy should give equal protection to all water uses.** By promoting policies that favor a specific type of water use over other beneficial uses, policymakers run the risk of a challenge from other water users. Farmers and ranchers, for example, are required to go through a lengthy and expensive process when they attempt to appropriate water for agricultural purposes or change a portion of their water right. The appropriation of significant quantities of water for development (or other uses) should be required to go through a similar review process.

As previously mentioned to the committee, the CFC is committed to working with our partner groups, the agricultural community and other stakeholders in forming forward-thinking and science-based groundwater policy. We appreciate the committee's continued interest in this topic as well as the opportunity to comment.

Sincerely,

Karen Knudsen

Executive Director